NO. 83867-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA HARRIS,

Petitioner,

v.

HON. EDSONYA CHARLES, DIRECTOR OF KING COUNTY ADULT DETENTION, and CITY OF SEATTLE,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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A. IDENTITY OF PARTY

Petitioner Joshua Harris submits this supplemental brief with the understanding this court will consider the briefs filed in the Court of Appeals together with the petition for review.

B. ISSUES

1. Was Harris entitled to credit for 140 days served on pretrial electronic home detention against his 90 day sentence for DWLS in the third degree, a simple misdemeanor with a maximum sentence of 90 days in jail? Do equal protection, double jeopardy or due process require credit for pretrial electronic home detention?

2. Where the superior court granted Harris' writ of habeas corpus, was the City's appeal of that judgment moot when the Seattle Municipal Court implemented the order to credit 140 days of electronic home detention against his 90 day sentence before the City appealed the order, the City did not obtain a stay of the order and acquiesced in the execution of the judgment? Does double jeopardy and due process preclude a court from re-sentencing Harris when he has completed the original sentence?

C. STATEMENT OF THE CASE

Petitioner Harris relies upon the statement of facts set forth in the briefs and petition previously submitted. The key facts that bear repeating are as follows.

Harris was charged with DWLS third degree and was released to electronic home detention with breath tests in addition to posting $5,000 bail. CP 10. On March 7, 2008, Seattle Municipal Court Judge Edsonya Charles sentenced Harris to the statutory maximum 90 days in jail for DWLS in the third degree. CP 13. The judge refused to give him credit for the 140 days of electronic home detention he served pre-adjudication. CP 14. Harris was ordered to report to jail on April 9, 2008. Harris filed a write of habeas corpus on March 31, 2008. His petition alleged the denial of credit for term served on electronic home detention violated his right to equal protection of the law. CP 5-7.

The superior court granted the writ on April 7, 2008 and ordered the Seattle Municipal Court to give Harris credit for the time he served on pretrial electronic home detention. CP 38-39. The City did not seek a stay of the superior court order. On April 8, 2008, Judge Charles complied with the order from superior court and credited Harris' time on electronic home detention against his 90 day jail term. Appendix 1 to Respondent's Brief.

Consequently, Harris' jail sentence was completed.

The City filed a notice of appeal from the superior court order on May 5, 2008. The Court of Appeals granted review and reversed the decision of the superior court on August 31, 2009. Harris petitioned this Court for review on September 24, 2009. The petition for review was granted on April 28, 2010.

D. ARGUMENT & AUTHORITY

1. Harris was entitled to credit against his sentence for the 140 days he served on pretrial electronic home detention.

a. The equal protection clause requires that Harris be given credit for time served on pretrial electronic home detention.

Both the Washington State and federal Constitutions guarantee like treatment for those similarly situated. US Const., amend XIV; Wash Const., art. I, sec. 12; *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). The equal protection clause is violated if a law is administered in a way that unjustly discriminates between individuals that are similarly situated. *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). Harris' claim should be analyzed using the rational basis test because his claim does not involve a suspect or semi-suspect class and does not threaten a fundamental right. *Id.*

at 673. "The rational basis test requires that the challenged law (1) rest on a legitimate state interest and (2) be rationally related to achieving that interest." *Madison v. State*, 161 Wn.2d 85, 103, 163 P.3d 757 (2007). Denying credit for pretrial electronic home detention for misdemeanor defendants violates equal protection. There is no rational basis to deny such credit to misdemeanants, like Harris, when credit is afforded to all other groups of criminal defendants.

Persons convicted of felony and misdemeanor crimes are similarly situated for purposes of determining credit for pretrial detention. All such persons must receive credit for pretrial detention served in total confinement. *Reanier v. Smith*, 83 Wn.2d 342, 349, 517 P.2d 949 (1974). While the sentencing schemes for felons and misdemeanants differ is some respects, they share the goal of punishment and retribution. *Wahleithner v. Thompson*, 143 Wn.App. 931, 941, 143 P.3d 321 (2006). Also, misdemeanants and felons are similarly situated for purposes of imposing electronic home detention as a condition of pretrial release. The court rules governing pretrial

conditions of release are the same for both groups. CrRLJ 3.2; CrR 3.2. The same constitutional limitations also apply. *Butler v. Kato*, 137 Wn.App. 515, 521, 154 P.3d 259 (2007); *State v. Rose*, 146 Wash.App. 439, 191 P.3d 83 (2008). The Court of Appeals was concerned that giving credit for pretrial EHD might Ainfluence the court=s decision . . to grant pretrial release.@ *Harris v. Charles*, 151 Wn.App. 929, 938, 214 P.3d 962 (2009). The factors governing that decision are listed in the rules; the length of the potential jail sentence is not one of them.

Criminal defendants include felons, juveniles and misdemeanants. Both felons and juveniles are statutorily entitled to credit for pretrial electronic home detention. *State v. Speaks*, 119 Wn.2d 204, 829 P.2d 1096 (1992) (Felons are entitled to credit for time served on pretrial home detention.); *State v. Ashbaker*, 82 Wn.App. 630, 919 P.2d 619 (1996) (Juveniles are entitled to credit for pre-adjudication time served on electronic home detention. "[W]e see no reason . . . why adults should received credit and juveniles should not."). The legislature has explicitly afforded such

credit to felons under the provisions of the SRA. RCW 9.94A.505(6) provides that a "sentencing court *shall* give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." (Emphasis added). The term "confinement" includes both total and partial confinement. RCW 9.94A.030(8). Partial confinement includes electronic home detention. RCW 9.94A.030 (27). Likewise, the legislature has afforded such credit to juveniles under the provisions of the JJA. RCW 13.40.160(9) provides that "[w]henever a juvenile offender is entitled to credit for time spent in detention prior to a dispositional order, the dispositional order shall specifically state the number of days of credit for time served[1]." The

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[1] This Court previously held that juveniles are entitled credit for time served pre-adjudication.

> The juvenile statutory scheme contemplates that credit will be given to some juveniles. Petitioners assert that an impermissible classification occurs if some juveniles and not others receive credit. As stated before in *Reanier*, we held that credit for time served was mandated whether the reason for the hold was inability to post bond or otherwise. Consequently, the State's argument that only a classification based on indigency of an accused violates the equal protection clause, must fall. As we previously determined with adults, we now find that this disparate treatment among juveniles is impermissible.

In re Trambitas, 96 Wn.2d 329, 333-34, 635 P.2d 122 (1981).

legislature has defined confinement as physical custody in a "detention facility". RCW 13.40.020 (5). Detention facility includes electronic monitoring. RCW 13.40.020 (9).

There can be no rational basis to deny misdemeanants credit for pretrial home detention when such a holding would result in misdemeanants being the *only* group of criminal defendants not entitled to such credit. It may be argued that felons and juveniles are entitled to credit for pretrial electronic home detention because the legislature has provided for such credit statutorily and that there is no statute explicitly giving credit to misdemeanants. However, the fact that the legislature has *not explicitly excluded* misdemeanants from receiving credit for time served on pretrial electronic home detention evinces its intent that such credit should be afforded. Literal and strict interpretation must be given criminal statutes. *State v. Bell*, 83 Wn.2d 383, 518 P.2d 696 (1974); *State v. Bird*, 95 Wn.2d 83, 622 P.2d 1262 (1980). "The legislature is presumed to intend the plain meaning of its language." *State v. Gibson*, 16 Wn.App. 119, 127, 553 P.2d 131 (1976). A

strict interpretation of the criminal statutes requires that the legislature make explicit any exceptions.

There is no statutory authority which precludes awarding credit to misdemeanants for time served on pretrial electronic home detention. Had the legislature intended misdemeanants to be the *only* class of criminal defendants to not receive this type of credit, it would have made its intention explicit. Further, changes in the DUI statute reveal that the legislature did not intend such a result. In 1999, the legislature amended RCW 46.61.5055[2] to *delete* from the statute: "'Electronic home monitoring' shall not be considered confinement as defined in RCW 9.94A.030[.]" Laws 1999, ch.5, §1.

The DUI statute is also instructive. A criminal defendant can be charged with either a misdemeanor or felony DUI. RCW 46.61.5055. Felony DUIs are punishable under the SRA. If misdemeanants were denied credit for pretrial electronic home detention, it would mean that persons convicted

[2] RCW 46.61.5055 deals primarily with misdemeanor alcohol violations. RCW 46.61.5055(4) addresses felony DUI.

of felony DUI – a much more serious crime – would be entitled to credit towards their sentence for time served on pretrial electronic home detention under the SRA while misdemeanants would receive no credit.

In holding that misdemeanants and felons were not similarly situated, the Court of Appeals focused on the differences between the sentencing systems of felons and misdemeanants.

> Typically, a felon who receives credit for time served on electronic home monitoring will still have a significant amount of confinement left to serve. The same is much less likely true in misdemeanor sentencing. If the court were required to credit the sentence ultimately imposed upon a misdemeanor defendant with time served on electronic home monitoring as a condition of pretrial release, a defendant like Harris who serves more than 90 days could avoid serving any jail time.

Harris v. Charles, 151 Wn.App. 929, 938, 214 P.3d 962 (2009). This is not a rational basis to deny misdemeanants credit for pretrial electronic home detention. First, most defendants convicted in courts of limited jurisdiction are charged with gross misdemeanors, leaving a substantial portion of their sentences left to serve if convicted. Second, as the Court of Appeals pointed out, there are a number of felony offenses with low standard range sentences comparable to misdemeanor sentences. *Id.* at 939 note 3. While such

felonies "may be viewed by the legislature as having less impact on public safety than some misdemeanors," there are many misdemeanor offenses that have even less impact on community safety. Third, the court's holding inexplicably ignores the fact that electronic home detention is a significant deprivation of liberty classified by the legislature as both punishment and imprisonment. *Id.* at 939 note 4. Finally, the court's rationale is not supported when considering that juveniles are afforded credit for pretrial electronic home detention. At the very least, misdemeanants are similarly situated to juveniles.

Under the JJA, juveniles can be charged with both misdemeanor and felony offenses. The sentencing goals of the JJA are similar to that of misdemeanor sentencing – rehabilitation. It is clear that juveniles face lighter sentences than both felons and misdemeanants. If juveniles are afforded credit for pretrial electronic home detention, there is no reason why misdemeanants should not.

Equal protection requires that Harris be given credit towards his

sentence for time served on pretrial electronic home detention. Misdemeanants are similarly situated with both felons and juveniles. In any event, rehabilitation is not implicated here as the trial court imposed the statutory maximum sentence, so probation was not an option. *See State v. Gailus*, 136 Wash.App. 191, 147 P.3d 1300 (2006) (where no time was suspended, probation may not be imposed). The only question at sentencing was whether the statutory maximum would be served in total confinement, or would be satisfied by the time already served on EHD. There is no rational basis for denying Harris credit for pretrial electronic home detention when every other class of criminal defendant is entitled to such credit.

b. Pretrial electronic home detention is punishment.

It is clear that the legislature intended electronic home detention to be punishment. Both the SRA and the JJA include electronic home detention in the definition of "confinement". Further, the legislature has made it unlawful for an individual to receive more than 365 days of combined actual jail time and electronic home monitoring for the crime of DUI. RCW 46.61.5055(12)(c) provides:

> Whenever the combination of jail time and electronic home monitoring or alternative sentence would exceed three hundred sixty-five days . . . the sentence shall be reduced *so that the combination does not exceed three hundred sixty-five days*.

RCW 46.61.5055(12)(c) (emphasis added).

"Pretrial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty." *Reanier v. Smith*, 83 Wn.2d 342, 349, 517 P.2d 949 (1974). Double jeopardy guarantees the offender will not serve more time in confinement than is provided by law. *Id.* at 347 note 4. Washington courts adopted the double jeopardy analysis from *North Carolina v. Pearce*. "[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that *punishment already exacted* must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *State v. Phelan*, 100 Wn.2d 508, 671 P.2d 1212 (1983) (*Phelan II*), *citing North Carolina v. Pearce*, 395 U.S. 711, 718-19, 89 S.Ct. 2072, 2077, 23 L.Ed.2d 656 (1969) (Emphasis added). Prior detention must be credited to any sentence imposed. *Id.* This is particularly true when the statutory maximum punishment has been served.

> The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction . . . . Though not so dramatically evident, the same principle obviously

> holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.

North Carolina v. Pearce, 395 U.S at 718, *quoted in Phelan*, 100 Wn.2d at 515.

The Court of Appeals asserted that Harris did not establish electronic home detention when used as a condition of pretrial release "was intended to be punishment or that the effect is so punitive that it amounts to a criminal penalty." *Harris v. Charles*, 151 Wn.App. 929, 940-41, 214 P.3d 962 (2009). While EHD does not involve the same "hardships of staying in jail," it is still detention. Harris' movements and ability to leave his home were controlled and he was subjected to breath tests to determine whether he used alcohol. He was also required to post $5,000 in addition to the EHD to secure his release from total confinement. Also, had Harris not complied with the requirements of electronic home detention, he may have faced escape charges.[3] Further, in its opinion for this case, the Court of Appeals conceded that the legislature

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[3] A person is guilty of escape in the second degree if he "knowingly escapes from a detention facility." RCW 9A.76.120 (a). A "detention facility" is defined as:

> [A]ny place used for the confinement of a person (a) arrested for, charged with or convicted of an offense. . . or (d) otherwise confined pursuant to an order of a court . . . or (e) in any work release, furlough, or other such facility or program[.]

RCW 9A.76.010 (3). Electronic home detention is considered a "detention facility". *State v. Parker*, 76 Wn.App. 747, 888 P.2d 167 (1995). A person is guilty of escape in the third degree if "he escapes from custody." RCW 9A.76.130(1). "Custody" is defined

has declared electronic home detention to be punishment. "The legislature believes that electronic monitoring, as an alternative to incarceration, is a proper and cost-effective *method of punishment* and supervision for many criminal offenders." *Harris v. Charles*, 151 Wn.App. 929, 939 fn 4, 214 P.3d 962 (2009).

Electronic home detention clearly constitutes confinement and, therefore, is punishment. Our statutes require that persons charged with both felony and juvenile offenses get credit for time served on pretrial electronic home detention. RCW 9.94A.505(6); RCW 13.40.160(9). Because misdemeanants are similarly situated, and because the double jeopardy clause would require it, Harris was entitled to credit for the 140 days he served on pretrial electronic home monitoring.

2. The double jeopardy and due process clauses preclude the Seattle Municipal Court from resentencing Harris.

The City's appeal is moot as denying Harris credit for the time he previously served on electronic home detention would constitute double jeopardy under the facts of this case. *State v. Veazie*, 123 Wn.App. 392, 397-98, 98 P.3d 100 (2004). A question is moot when the court cannot grant relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). The City is

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as "restraint pursuant to a lawful arrest or an order of a court[.]" RCW 9A.76.010(2).

not entitled to the relief obtained: re-imposition of the 90 day jail term would violate the constitutional prohibition against double jeopardy.

The constitutional prohibition against multiple punishments may prevent the government from re-sentencing a defendant.[4] *State v. Hardesty*, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996). Double Jeopardy and due process protect a defendant's legitimate expectation of finality in the original sentence. *Hardesty*, 129 Wn.2d at 312, *citing DeWitt v. Ventetoulo*, 6 F.3d 32 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1542 (1994).

> [T]he defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, *unless the defendant is on notice the sentence might be modified due to either a pending appeal* or the defendant's own fraud in obtaining the erroneous sentence.
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> What matters for purposes of double jeopardy is not the *legality or illegality of the sentence* under the sentencing statute, but the defendant's expection of finality.

Hardesty, 129 wn.2d at 312-13, 315 (emphasis added). A defendant's expectation of finality is determined in each case by examining a number of factors such as the completion of the sentence, the passage of time, the pendency of appeal or review, or the defendant's misconduct. *Id.* at 311. *See also State v. Traicoff*, 93 Wn.app. 248, 256, 967 P.2d 1277 (1998) (no

[4] Washington state's double jeopardy clause is interpreted in the same manner as the

reasonable expectation of finality in portion of sentence – community placement – Traicoff had not yet begun to serve.); *State v. H.J.*, 111 Wn. App. 298, 304-05, 44 P.3d 874 (2002) (no expectation in finality where juvenile had served only one month of 24 month period of supervision).

The Court of Appeals decision conflicts with *Hardesty* because the court looked at only one of the factors relating to the expectation of finality – whether an appeal was available. In this case, that factor is neither relevant nor dispositive.

The superior court granted Harris' writ of habeas corpus on April 7, 2008. The City did not seek a stay of the order.[5] The next day, the municipal court held a hearing to implement the order. The City was represented by the same Assistant City Attorney who litigated the writ. The municipal court complied with the superior court's order. The judge gave Harris credit for 140 days of electronic home detention against his 90 day sentence and struck the jail report date. Harris had satisfied his sentence. Only after Harris was re-sentenced did the City appeal the superior court order granting the writ.

Generally, double jeopardy is not implicated where the government files a timely appeal from an allegedly lenient sentence. *State v. Freitag*, 127

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federal provision. *Hardesty*, 129 Wn.at 310, note 2.

[5] Had the City done so, Harris would have sought a stay of his report date. The status quo

Wn.2d 141, 145, 896 P.2d 1254 (1995). In *Freitag*, "[t]he state immediately appealed the trial court's erroneous sentence putting Freitag on notice that her sentence was not final." *Id.* But in this case, the City's subsequent appeal does not prevent Harris' legitimate expectation in the finality of his sentence for three reasons. First and foremost, Harris completed his sentence. On April 7, 2008, the municipal court credited him with the time he served on electronic home detention. Harris' obligation to the court was satisfied. His 90 day jail term was completed. He legitimately expected his sentence was final. Second, the City took no action to prevent the superior court's order from being implemented by the municipal court. The City did not seek a stay of the order pending a subsequent appeal. Rather, the City stood by as the sentencing judge executed the superior court's judgment and credited Harris with sufficient time to satisfy his entire jail sentence. At that point, Harris had no expectation that the City would seek to undo what had been completed. While the City has a statutory right to appeal the superior court's judgment as a final order pursuant to RAP 2.2(a)(1), the City filed the appeal only after the superior court judgment had been executed. The City's appeal from the writ – absent any effort to prevent the implementation of the superior court's order and in light of the acquiescence to the execution of that

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could have been maintained pending the City's appeal.

judgment – comes too late to divest Harris of his legitimate expectation of finality in his completed sentence. Third, *Freitag* and similar cases are inapplicable because the sentencing scheme and related court rules at issue there expressly authorized the prosecution to appeal a sentence. *Id. See also* RCW 9.94A.585(2); RAP 2.2(b)(6); *State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987).

In contrast, the prosecution has no right to appeal sentences imposed by courts of limited jurisdiction. The government's ability to appeal, when granted, is strictly construed. *State v. Rock*, 9 Wn.App. 826, 829, 515 P.2d 830 (1973), *rev. denied*, 83 Wn.2d 1007 (1974). There is no statute, court rule or case that grants the government the right to appeal sentences imposed by courts of limited jurisdiction. Unlike RAP 2.2, RALJ 2.2 does not authorize the government to appeal a criminal sentence. While the RALJ generally allow an "aggrieved party" to appeal a "final decision," the same rule then specifically restricts the government's right to appeal in criminal cases. RALJ 2.1(a); RALJ 2.2(a) and (c). RALJ 2.2(c) permits the prosecution to appeal in criminal cases "only" in the types of decisions listed. RALJ 2.2 (c)(1)-(4). The list is exclusive and does not authorize the government to appeal any sentences.

In support of its contrary holding, the Court of Appeals looked at only one of the *Hardesty* factors, whether the time for appellate review had expired. *Rico* is clearly distinguishable. In that case, as in *Hardesty*, the government was entitled to appeal the sentence. Also, the sentence imposed in *Rico* was the result of a clear mistake that the government immediately sought to correct. The defendant was not entitled to more than the benefit of her plea bargain.

The City is not entitled to the relief obtained in the Court of Appeals as re-imposition of Harris' 90 day jail term would violate the constitutional provision against multiple punishments. Harris has a legitimate expectation in the finality of his sentence. As such, the Court should reverse the Court of Appeals decision permitting Harris to be remanded into custody to serve an additional 90 days in jail.

E. CONCLUSION

For the reasons stated above, this court should reverse the Court of Appeal's decision remanding Harris back to Seattle Municipal Court for re-sentencing.

Respectfully submitted this 28th day of June, 2010,

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